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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

FLORA L. KIMBLE,
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In that work is a major life activity under the Americans with Disabilities Act and the Rehabilitation Act and their implementing regulations, whether a person who is unable to drive for more than one-half hour qualifies as disabled under the Rehabilitation Act, where such disability limits her capacity to work, a major life activity.

In that work is a major life activity under the Americans with Disabilities Act and the Rehabilitation Act and their implementing regulations, whether driving to and from work is a major life activity.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition, and is currently unpublished.

The opinion of the United States District Court for the Northern District of Illinois appears at Appendix B to the petition, and is currently unpublished.

JURISDICTION

The Court of Appeals entered its judgment on August 17, 2010. No petition for rehearing was filed. On November 10, 2010 Justice Kagan granted to January 14, 2011 Petitioner's request for an extension of time, before petitioner was represented by counsel. This petition is timely transmitted on January 14, 2011 to the Clerk of Court.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 791:

§ 791. Employment of individuals with disabilities

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions.

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the

Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Disability Employment Partnership Board and the President's Committee for People with Intellectual Disabilities. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative

changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement

opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment
The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees
The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the

Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on

President's Committee on Employment of People With Disabilities

The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

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29 U.S.C. § 794a

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to

claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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29 U.S.C. § 794d
§ 794d. Electronic and information technology

(a) Requirements for Federal departments and agencies

(1) Accessibility

(A) Development, procurement, maintenance, or use of electronic and information technology
When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall

ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology—

(i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and

(ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.

(B) Alternative means efforts

When development, procurement, maintenance, or use of electronic and information technology that meets the standards published by the Access

Board under paragraph (2) would impose an undue burden, the Federal department or agency shall provide individuals with disabilities covered by paragraph (1) with the information and data involved by an alternative means of access that allows the individual to use the information and data.

(2) Electronic and information technology standards

(A) In general

Not later than 18 months after August 7, 1998, the Architectural and Transportation Barriers Compliance Board (referred to in this section as the "Access Board"), after consultation with the Secretary of Education, the Administrator of General Services, the Secretary of Commerce, the Chairman of the Federal Communications Commission, the Secretary of Defense, and the head of any other Federal department or agency that the Access Board determines to be appropriate, including consultation on relevant research findings, and after consultation with the electronic and information technology industry and appropriate public or nonprofit agencies or organizations, including organizations representing individuals

with disabilities, shall issue and publish standards setting forth—

(i) for purposes of this section, a definition of electronic and information technology that is consistent with the definition of information technology specified in section 11101(6) of Title 40; and

(iii) the technical and functional performance criteria necessary to implement the requirements set forth in paragraph (1).

(B) Review and amendment

The Access Board shall periodically review and, as appropriate, amend the standards required under subparagraph (A) to reflect technological advances or changes in electronic and information technology.

(3) Incorporation of standards

Not later than 6 months after the Access Board publishes the standards required under paragraph (2), the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation and each Federal department or agency shall revise the Federal procurement policies and

directives under the control of the department or agency to incorporate those standards. Not later than 6 months after the Access Board revises any standards required under paragraph (2), the Council shall revise the Federal Acquisition Regulation and each appropriate Federal department or agency shall revise the procurement policies and directives, as necessary, to incorporate the revisions.

(4) Acquisition planning

In the event that a Federal department or agency determines that compliance with the standards issued by the Access Board under paragraph (2) relating to procurement imposes an undue burden, the documentation by the department or agency supporting the procurement shall explain why compliance creates an undue burden.

(5) Exemption for national security systems

This section shall not apply to national security systems, as that term is defined in section 11103 of Title 40.

(6) Construction

(A) Equipment

In a case in which the Federal Government provides access to the public to information or data through electronic and information technology, nothing in this section shall be construed to require a Federal department or agency--

(i) to make equipment owned by the Federal Government available for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public; or

(ii) to purchase equipment for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public.

(B) Software and peripheral devices
Except as required to comply with standards issued by the Access Board under paragraph

(2), nothing in paragraph (1) requires the installation of specific accessibility-related software or the attachment of a specific accessibility-related peripheral device at a workstation of a Federal

employee who is not an individual with a disability.

(b) Technical assistance
The Administrator of General Services and the Access Board shall provide technical assistance to individuals and Federal departments and agencies concerning the requirements of this section.

(c) Agency evaluations
Not later than 6 months after August 7, 1998, the head of each Federal department or agency shall evaluate the extent to which the electronic and information technology of the department or agency is accessible to and usable by individuals with disabilities described in subsection (a)(1) of this section, compared to the access to and use of the technology by individuals described in such subsection who are not individuals with disabilities, and submit a report containing the evaluation to the Attorney General.

(d) Reports

(1) Interim report
Not later than 18 months after August 7, 1998, the Attorney General shall prepare and submit to the President a

report containing information on and recommendations regarding the extent to which the electronic and information technology of the Federal Government is accessible to and usable by individuals with disabilities described in subsection (a)(1) of this section.

(2) Biennial reports
Not later than 3 years after August 7, 1998, and every 2 years thereafter, the Attorney General shall prepare and submit to the President and Congress a report containing information on and recommendations regarding the state of Federal department and agency compliance with the requirements of this section, including actions regarding individual complaints under subsection (f) of this section.

(e) Cooperation
Each head of a Federal department or agency (including the Access Board, the Equal Employment Opportunity Commission, and the General Services Administration) shall provide to the Attorney General such information as the Attorney General determines is necessary to conduct the evaluations under subsection (c) of this section and prepare the reports under subsection (d) of this section.

(f) Enforcement

(1) General

(A) Complaints
Effective 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2) of this section, any individual with a disability may file a complaint alleging that a Federal department or agency fails to comply with subsection

(a)(1) of this section in providing electronic and information technology.

(B) Application
This subsection shall apply only to electronic and information technology that is procured by a Federal department or agency not less than 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2) of this section.

(2) Administrative complaints
Complaints filed under paragraph (1) shall be filed with the Federal department or agency alleged to be in noncompliance. The Federal department or agency receiving the complaint shall apply the complaint procedures established to implement section 794 of

this title for resolving allegations of discrimination in a federally conducted program or activity.

(3) Civil actions
The remedies, procedures, and rights set forth in sections 794a(a)(2) and 794a(b) of this title shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1).

(g) Application to other Federal laws
This section shall not be construed to limit any right, remedy, or procedure otherwise available under any provision of Federal law (including sections 791 through 794a of this title) that provides greater or equal protection for the rights of individuals with disabilities than this section.

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29 U.S.C. § 705

§ 705. Definitions

(20) Individual with a disability

(A) In general

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who—

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter [29 U.S.C.A. § 720 et seq., 771 et seq., or 795 et seq.].

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], any person who has a disability as defined in section 12102 of Title 42.

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42 U.S.C. § 12102

§ 12102. Definition of disability

As used in this chapter:

(1) Disability
The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):
(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary

eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

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REGULATORY PROVISIONS INVOLVED

Title 29: Labor
PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific

Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.
(See §1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or

mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an

impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits

major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See §1630.3 for exceptions to this definition).

(n) *Essential functions*—(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons,

including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation,

significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of

the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies

on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

STATEMENT OF THE CASE

Allegations: Petitioner brought an action in District Court under the Rehabilitation Act of 1973, 29 U.S.C. § 791 against her employer, the Postmaster General. Petitioner had suffered from vertebral artery dissection and a stroke and had a medical diagnosis of chronic disequilibrium symptoms including vertigo, and dizzy spells. After hospitalization and home recovery, she returned to work. Petitioner had filed a complaint with the Equal Employment Opportunity Commission (EEOC) of disability discrimination, and the administrative judge found no disability, and no discrimination on the basis of disability. Petitioner's administrative appeal therefrom was denied.

In her action at law, Petitioner alleged that she had requested assignment to a postal facility closer to her home, a reasonable accommodation in accordance with her physician's recommendation that she not travel over 30 minutes at a time, not travel at night, and not lift over 10 pounds. She alleged that respondent disregarded her physician's recommendation, declined to make further reasonable accommodation, by thereafter reassigning her to another facility twenty-one miles further from her home, a distance which she could not drive, causing her to be absent from work. Petitioner used vacation and sick leave, then unpaid leave under the Family and Medical Leave Act. Respondent claimed that her original re-assignment closer to home was only temporary. Thereafter, her employment was involuntarily terminated, due to discrimination against her because of her disability.

District Court (Appendix B): The Court granted summary judgment for respondent. The District Court held that:

- the Rehabilitation Act provides that respondent shall not discriminate against a qualified individual with a disability, solely because of the disability. 29 U.S.C. § 794(a);

- the standards used to determine whether a violation of the Rehabilitation Act has occurred are those used to interpret the Americans

with Disabilities Act (ADA). 29 U.S.C. § 794(d);

- the parties do not contest whether respondent was aware of petitioner's condition;

- respondent's position was that petitioner was not disabled as defined by ADA, and even if petitioner were disabled, respondent had no duty to accommodate her disability;

- petitioner did not prove that driving a vehicle, as opposed to working, is a major life activity under ADA which her disequilibrium substantially limited;

- working is a major life activity under ADA. 29 C.F.R. § 1630.2;

- driving a vehicle in and of itself is not listed by EEOC as a major life activity, and it is not a major life activity per *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009), *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008), *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001); *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 643 (2d Cir. 1998);

- the rule that driving a vehicle is not a major life activity is not unyielding, in that the inability to drive could support a disability if it impairs petitioner's ability to work altogether, i.e., that the inability to drive must substantially limit one's employment generally and restrict petitioner from performing a broad range of jobs in various classes;

- petitioner's inability to drive more than thirty minutes at a time does not qualify as a major life activity or impair her ability to work in general;

- summary judgment obtains because petitioner could not establish that she request or needed any special accommodations or assistance at work;

- respondent was not responsible to accommodate petitioner's inability to drive.

Court of Appeals (Appendix A): The Court affirmed the grant of summary judgment in favor of respondent. The Court of Appeals held that:

- petitioner "conflates (fuses or confuses) diagnosis with disability," in that a person with a physical or mental impairment qualifies as disabled under the Rehabilitation Act only if the condition substantially limits a major

life activity under 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1)(A);

- petitioner did not identify a major life activity which was affected by her disequilibrium, even though she claimed that vertigo is a symptom of her disequilibrium and that people with vertigo often report difficulty with walking, which is a major life activity, per 29 U.S.C. § 1630.2(i);

- petitioner did not adduce evidence that she had difficulty in walking;

- petitioner did not argue that driving is a major life activity, a potential argument foreclosed by *Winsley*, *supra*, which held that driving is not "so important to everyday life that almost anyone would consider himself limited in a material way if he could not" drive;

- unlike other recognized major life activities, driving is a privilege subject to revocation, and its importance varies greatly, based on an individual's geographic location;

- petitioner left open the possibility that a person who is unable to drive might qualify as disabled if the inability substantially limits her capacity to perform other major life activities, such

as working, per *Winsley supra,* in that her inability to reach employers more than thirty minutes driving distance from her home equates to substantial limitation in her ability to work;

- petitioner's domicile in Chicago allows her access to many jobs which are reachable by automobile in less than thirty minutes, or otherwise accessible by public transportation.

REASONS FOR GRANTING WRIT

I. In that work is a major life activity under the Americans with Disabilities Act and the Rehabilitation Act and their implementing regulations, a person who is unable to drive for more than one-half hour qualifies as disabled under the Rehabilitation Act, where such disability to drive substantially limits her capacity to perform work.

The Court of Appeals erred in so markedly differentiating between driving to work, and work itself, in essentially holding that the former is mutually exclusive of the latter. In an increasingly mobile society wherein the existence in certain urban areas of public transportation does not vitiate the need for private auto transportation, this case is ripe for this Court's consideration that driving a vehicle must be regarded by employers as essential to an employee's ability to find work and maintain

employment. A disability which prevents an employee from driving longer distances is not merely a physical condition unrelated to performance in the workplace. To the contrary, one's disability and inability in commuting to a distant workplace is integrally related to her performance of work, a major life activity protected under the Rehabilitation Act and ADA.

The Court of Appeals does not recognize that in the current economic climate, able-bodied and disabled workers alike are experiencing severe difficulty in obtaining employment, notwithstanding their skills and notwithstanding the existence in certain urban areas of mass transportation, which public conveyances frequently require transfer(s) from one bus or train to another, consuming extensive commuting time. Driving a vehicle in the year 2011 and the past twelve years has been an extension of work, not unrelated to work, and petitioner's disability in driving more than thirty minutes was not accommodated by respondent, proximately causing her later employment separation. This case has national importance in enabling this Court, if *certiorari* is granted, to establish *stare decisis* that a disabled employee's ability to commute to work was statutorily intended by Congress to be protected under the Rehabilitation Act, to the same extent as working itself, a major life activity.

Petitioner urges that she "conflated" nothing, and that she was not confounded, or confused, between her diagnosis and her disability. The Court

of Appeals deduced that her able performance in the workplace somehow vitiated her uncontroverted diagnosis of vertigo, causing her physician to restrict her motor vehicle driving. That restriction was not mere perception; that restriction was reality, in that it was a diagnosed disability, which respondent-employer confounded, and failed to accommodate. It is common sense, and a plain meaning statutory interpretation of the Rehabilitation Act, in light of 43+ million Americans who exhibit a physical or mental disability, that if one is disabled and prevented from driving to a distantly-assigned workplace, one cannot competently perform work thereat, a major life activity, *ergo*, resulting in employment disability discrimination of the employee.

II. In that work is a major life activity under the Americans with Disabilities Act and the Rehabilitation Act and their implementing regulations, driving to and from work is also major life activity.

The Court of Appeals (and District Court) erred in holding so summarily that national caselaw clearly establishes that driving is not a major life activity. Petitioner urges that a conflict among the circuit courts of appeals does exist, and that *certiorari* is merited, so that this Court can squarely address this issue, which issue has not come foursquare before this Court. Petitioner submits that she raised by implication this issue, that she did not waive this issue, and that plain error of the Court of Appeals merits *certiorari* concerning this issue.

Notwithstanding the caselaw cited *supra* from the Court of Appeals opinion, in *Kellogg v. Energy Safety Services, Inc., supra,* the lower trial Court stated that:

> ...This court believes that there is no question that in Wyoming, where public transportation is virtually non-existent, distances between towns is measured by hours of driving, economic conditions often require residents to seek employment outside of the their local community, and long winter conditions significantly by foot or bicycle travel, driving is clearly a major life activity...
>
> ... whether driving constitutes a "major life activity" under the ADA is a question of first impression in this (Tenth) Circuit... although driving is not one of the listed activities in the EEOC regulation, *that does not end the inquiry* because the regulation does not purport to give an exhaustive list..(emphasis supplied).

Even though the *Kellogg* court concluded that driving is not a major life activity, it did state in *obiter dictum* that:

> ...it cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the

> ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of "caring for one's self encompasses normal activities of daily living; including... driving..." *Holt v. Grand Lake Mental Health Center*, 443 F.3d 762, 767 (10th Cir. 2006).

A conflict among the circuits arose in *Kellogg* by Senior Judge Holloway's concurring and dissenting opinion wherein he stated that:

> As to her ADA claim, I must respectfully dissent because I conclude that the district judge correctly held that driving is a major life activity under the ADA.... Congress chose to use *broad language, employing only everyday terms*, to express its intent regarding the scope of coverage of the Act... Thus it is clear that Congress meant the term "major life activity" to have a wide reach and that we should construe it accordingly. Giving the words their understood and accepted meaning, keeping in mind that the use of this broad language is indicative of Congressional intent, and applying these principles in the context of *modern life in our nation, I conclude that driving is clearly a major life activity,* as the district judge held here, at page 1131 (emphasis supplied).

> It has been cogently observed that "there are compelling reasons to think that driving should qualify as a major life activity. Driving appears to be 'central importance to most people's lives.'" *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184, 122 S.Ct. 681 (2002).

The Seventh Circuit preceded its *Winsley* opinion by *Sinkler v. Midwest Property Management Limited Partnership*, 209 F.3d 678 (7th Cir. 2000) wherein it held that " 'Getting to and from work assignments' is not a major life activity. Rather, this task is either a *sub-species* of the activity of 'working' or of 'driving.'" at p. 685 (emphasis supplied) . Characterizing driving as a "sub-species" is itself conflating and confounding, and is not consistent, and in conflict, with Senior Judge Holloway's dissenting opinion in the Tenth Circuit that major life activities should be given broad and straightforward interpretation. Query: how can an employee *pro se* or represented by counsel easily devine what is a "sub-species" of working or driving? The Seventh Circuit view of driving a vehicle to and from work is, respectfully, arcane and overly pedantic and devoid of everyday terms, requiring the intervention of this Court through *certiorari*, to establish a consistent national precedent for the circuit and districts courts concerning driving, and/or driving to and from work, as a protected major life activity under the Rehabilitation Act, as petitioner in the matter *sub judice* was seeking to do with

respondent's reasonable accommodation, which accommodation respondent withheld, leading to employment discharge and ultimate summary judgment against petitioner, reversal of which petitioner also seeks through a grant of *certiorari* and full briefing thereafter.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued August 3, 2010
Decided August 17, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 09-2987

FLORA L. KIMBLE, *Plaintiff-Appellant,*	Appeal from the United States District Court for the Northern District of Illinois,
v.	Eastern Division.
JOHN E. POTTER, Postmaster General, United States Postal Service, *Defendant-Appellee.*	No. 06-cv-02589 Charles R. Norgle, Sr., *Judge.*

ORDER

Flora Kimble suffers from dizzy spells that

make it hazardous for her to drive long distances. In this lawsuit under the Rehabilitation Act, she claims that her former employer, the United States Postal Service, failed to accommodate her condition and then terminated her because of it. The district court granted summary judgment for the Postal Service, reasoning that Kimble had failed to demonstrate that she is disabled for purposes of the Act. We affirm the judgment.

Kimble, who is now 58, worked as a distribution clerk at the Postal Service's Irving Park Road Processing and Distribution Center ("Irving Park facility"), which is very close to O'Hare International Airport on Chicago's far northwest side. In June 1999 she was diagnosed with a vertebral artery dissection and a minor stroke, and after a hospitalization and home recovery, her doctor cleared her to return to work in September 1999. He recommended, however, that she not drive at night or for more than 30 minutes at a time because she was experiencing disequilibrium (dizziness).

Before her stroke Kimble drove to work from her home on the north side of Chicago, and the district court took judicial notice that she lived roughly 18 miles from the Irving Park facility.[1] Mindful of her doctor's recommendation that she not drive long distances, Kimble requested a temporary

[1] At summary judgment the Postal Service submitted driving directions from an online mapping site calculating the distance to the Irving Park facility as 18.73 miles and the driving time as 37 minutes, though it is unclear whether that time accounts for any traffic.

assignment to the Postal Service's downtown Chicago facility, which was closer to her home. The Postal Service granted her a 30-day assignment to that facility and several times extended the temporary change at Kimble's request. While working at the downtown facility, Kimble was not under any medical restriction other than an order from her doctor not to lift anything over ten pounds, though it is unclear from the record whether her job had ever required her to do so in the first place. In the meantime, although the Postal Service had warned Kimble that her reassignment was only temporary, she bought a home on Chicago's south side in October 1999, moving her even further away from the Irving Park facility. The district court took judicial notice that Kimble's new address was roughly 29 miles from that facility.

In April 2001, after permitting Kimble to work downtown for 15 months, the Postal Service told her that she had to report back to her original assignment at the Irving Park facility. Kimble never returned, citing her inability to drive there from her home on the south side. She first used all of her vacation and sick leave and then took unpaid leave under the Family and Medical Leave Act. She provided monthly doctor's notes explaining her absence until September 2001, when her health insurance expired. The Postal Service sent her notice the following month that she would be terminated if she did not submit medical information justifying her absence. Kimble did not respond, and she was terminated in November 2001.

Kimble lodged an administrative complaint of discrimination with the Postal Service in June 2002. She claimed that the Postal Service failed to accommodate her medical condition by requiring her to return to the Irving Park facility and had fired her on account of a disability. Kimble requested a hearing before an EEOC administrative law judge, who concluded in September 2004 that she failed to prove discrimination. The EEOC affirmed that decision on appeal in February 2006, and Kimble timely filed this lawsuit claiming disability discrimination under the Rehabilitation Act, 29 U.S.C. § 794, as well as age discrimination under the Age Discrimination in Employment Act, 29 U.S.C.§§ 621-634. The district court granted summary judgment for the Postal Service, reasoning that Kimble could not prevail on either claim because she is not disabled for purposes of the Rehabilitation Act and lacked evidence that her age played a role in the Postal Service's decision to fire her.

We review de novo the district court's grant of summary judgment, construing all facts and reasonable inferences in Kimble's favor. *See Hancock v. Potter*, 531 F.3d 474, 478 (7th Cir. 2008). On appeal Kimble has abandoned her claim of age discrimination and pursues only her claim under the Rehabilitation Act. To succeed on that claim, Kimble needed first to establish that she is "disabled" as the term is defined by the Act,[2] *see Garg v. Potter*, 521

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[2] The Rehabilitation Act incorporates the standards of the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 794(d). The ADA Amendments Act of 2008 expanded the ADA's definition of "disability," but the amendments are

F.3d 731, 736 (7th Cir. 2008), and her only argument on appeal is that the district court erred in concluding that she does not satisfy the definition. It is undisputed that Kimble suffers from chronic disequilibrium syndrome, and she asserts that this condition alone is sufficient to qualify her as disabled for purposes of the statute.

Kimble's shortcoming, however, is that she conflates diagnosis with disability. *See Burnett v. LFW Inc.*, 472 F.3d 471, 483 (7th Cir. 2006). A person with a physical or mental impairment qualifies as disabled under the Rehabilitation Act only if the condition substantially limits a major life activity. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1)(A); *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 755 (7th Cir. 2006). Kimble has never identified a major life activity that is affected by her disequilibrium. In her appellate brief, she states that vertigo is a symptom of her disequilibrium and that people with vertigo often report difficulty with walking, which is a major life activity. *See* 29 C.F.R. § 1630.2(i). But this general proposition does not help her because she did not argue, let alone present any evidence at summary judgment, that she personally has trouble walking. *See Burks*, 464 F.3d at 757 (explaining that plaintiff may not establish substantial limitation in major life activity by submitting only general information about medical condition); *Branham v. Snow*, 392 F.3d 896, 903 (7th Cir. 2004) (same).

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not retroactive and thus do not apply to Kimble's case. *See Fredricksen v. United Parcel Service, Co.*, 581 F.3d 516, 521 n.1 (7th Cir. 2009).

Nor does Kimble argue that driving is a major life activity, an argument that is, in any event, foreclosed by our recent decision in *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009). We explained in *Winsley* that unlike the other activities that have been classified as "major," driving is not "so important to everyday life that almost anyone would consider himself limited in a material way if he could not" drive. *Id.* Moreover, unlike any other recognized major life activity, driving is a privilege subject to revocation, and its importance varies greatly based on the individual's geographic location. *Id.* at 603-04. Our decision in *Winsley* is consistent with every federal appellate decision on the issue. *See Hawkins v. Soc. Sec. Admin.*, 368 F. App'x 136, 140 (Fed. Cir. 2010) (nonprecedential); *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Robinson v. Lockheed Martin Corp.*, 212 F. App'x 121, 124 (3d Cir. 2007) (nonprecedential); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998); *but see Anderson v. N.D. State Hosp.*, 232 F.3d 634, 636 (8th Cir. 2000) (assuming without deciding that driving may be a major life activity).

As Kimble points out, *Winsley* left open the possibility that a person who is unable to drive might qualify as disabled if the inability substantially limits her capacity to perform other major life activities such as working. 563 F.3d at 604. Hoping to fit that bill, Kimble argues that her inability to reach employers located more than 30

minutes' driving distance from her home means she is substantially limited in her ability to work. But a substantial limitation on working means that a plaintiff is unable to perform "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities" within the "geographical area to which [she] has reasonable access." 29 C.F.R. § 1630.2(j)(3); *see Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 782 (7th Cir. 2007). It might be the case that a person with Kimble's driving restriction living in a remote, rural area would be substantially limited in the ability to work because few, if any, jobs would be reasonably accessible to her. Kimble, however, lives in Chicago and therefore has access to an abundance of jobs that she can reach by car in under 30 minutes and many more that are accessible on foot or by public transportation. Thus, although Kimble's disequilibrium may prevent her from driving herself to the Irving Park Postal Service facility or to other workplaces more than 30 minutes' driving distance from her home, she is not otherwise limited, let alone substantially so, in her ability to work.

Finally, Kimble takes issue with the district court's observation that her move to the south side of the city increased her driving time to the Irving Park facility. She concedes that courts may take judicial notice of geographic distances but seems to argue that it was improper for the district court to infer that her 29-mile commute from the south side was longer than her 18-mile commute from the north side because driving times cannot necessarily be predicted by geographical distance alone. While this

proposition may be true in the abstract, it defies common sense to argue in this case that an additional 11 miles of city driving would not increase Kimble's commute. In any event, the fact that Kimble increased her driving time by moving to the south side was simply an observation by the district court and is irrelevant to the question whether she is disabled.

The district court's grant of summary judgment for the Postal Service is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FLORA L. KIMBLE,	)	
	)	
Plaintiff,	)	No. 06 C 2589
	)	
v.	)	Honorable
JOHN E. POTTER,	)	Charles. R. Norgle
Postmaster General,	)	
	)	
Defendant.	)	

OPINION AND ORDER

CHARLES R. NORGLE, District Judge

Before the Court is a motion for summary judgment filed on behalf of John E. Potter, Postmaster General of the United States Postal Service ("USPS"). Plaintiff Flora L. Kimble ("Kimble") is a former postal employee who alleges that the USPS discriminated against her on the basis of her age and her alleged disability in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and Section 501 of the Rehabilitation Act, 29 U.S.C. § 791 et seq. For the following reasons, the motion is granted.

I. BACKGROUND

A. FACTS

The following facts are undisputed. Prior to June 1999 Kimble worked as a distribution clerk at the USPS' Irving Park Road Processing and Distribution Center (the "Irving Park Facility"). The Irving Park Facility, according to Kimble, is situated very close to O'Hare International Airport, at 11560 West Irving Park Road in Chicago, Illinois. While working at the Irving Park Facility, Kimble lived on Chicago's North Side, first at 820 Belle Plaine Avenue, then at 1810 West Chase. She commuted to work by car. The distance to the Irving Park Facility from Kimble's home on Belle Plaine Avenue was approximately thirteen miles,[1] while the distance from Kimble's home on West Chase was approximately eighteen miles.

In June 1999 Kimble suffered a stroke. She was hospitalized from June 21, 1999 until July 2, 1999. In a letter dated July 27, 1999, Kimble's physician stated that as a result of her stroke Kimble had displayed symptoms of significant

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[1] When appropriate, the Court shall take judicial notice of the distances between two locations, as such information is readily ascertainable from a source whose accuracy cannot reasonably be questioned. *See Lowrance v. Pflueger,* 878 F.2d 1014, 1018 (7th Cir. 1989) (taking judicial notice of distance between Kenosha, Wisconsin and Tennessee); *Ikerd v. Lapworth,* 435 F.2d 197, 205 (7th Cir. 1970) (acknowledging that district court was entitled to take judicial notice that Madisonville, Kentucky was more than 100 miles from Terre Haute, Indiana); *United States v. Bell,* 357 F. Supp. 2d 1065, 1072 (ND. Ill. 2005) (taking judicial notice of distances between locations).

disequilibrium, though her symptoms were improving. Def.'s L.R. 56.1 Statement, Ex. G, Ltr. by Dr. John Ebihara. In the same letter Kimble's physician recommended that Kimble avoid driving long distances and that she drive during the day "to avoid any problems that may be complicated by her disequilibrium, (dizziness)." *Id.* The letter, however, did not indicate whether Kimble's driving was limited to a specific duration, although the parties agree that she was restricted from driving for more than thirty minutes at a time. *See id.*

On August 24, 1999 Kimble sent to Milton Jackson, her supervisor and the Senior Manager of Distribution Operations at the Irving Park Facility, a verification form issued by Dr. Ebihara that notified the USPS that she could resume work on September 2, 1999, provided that she not lift any object over ten pounds. In line with Dr. Ebihara's recommendations, Kimble requested that the USPS reassign her to work at a distribution facility in downtown Chicago, which was closer to her home on the North Side. The USPS granted Kimble's request and gave her a temporary detail at its main downtown facility (the "Chicago Central Facility").

During the time she worked at the Chicago Central Facility, Kimble testified that she did not need any special accommodations after she arrived at work. In fact, aside from her ten-pound lifting restriction, Kimble admitted that she could perform all her normal job functions. Def.'s L.R. 56.1 Statement, Ex. A., Hr'g Tr. at 11. Nevertheless, despite having no issues on the job, Kimble

requested on at least four occasions that the USPS change her assignment from a temporary detail to a permanent detail located at the Chicago Central Facility. The USPS repeatedly denied her requests, explaining on at least one occasion that at the end of her temporary detail she was required to report back to the Irving Park Facility. At some point while Kimble worked at the Chicago Central Facility, she relocated to 1433 East 72nd Place on Chicago's South Side. The distance to Kimble's permanent detail, the Irving Park Facility, from Kimble's new residence on the South Side was approximately twenty-nine miles.

On April 20, 2001 the USPS informed Kimble that effective April 21, 2001 her temporary detail was cancelled and that she was required to report to the Irving Park Facility on her next scheduled work day. From that point on, Kimble did not return to work. She used all of her available vacation days and, after that, all of her sick leave. Then, Kimble requested that she be placed on Family Medical Leave without pay.

In support of her leave, Kimble asked her doctor to send the USPS a note that evidenced her incapacity to work. She did so every thirty days. The first of these notes was dated June 28, 2001 and stated that Kimble was unable to work until July 28, 2001. Def.'s L.R. 56.1 Statement, Ex. N. The second note was dated July 30, 2001 and stated that Kimble was unable to return until August 30, 2001. *Id.*, Ex. O. The third and final note was dated August 29, 2001 and stated that Kimble was unable to return to

work until September 30, 2001. *Id.*, Ex. P. Thereafter, neither Kimble nor her physician submitted to the USPS any medical documentation regarding her capacity to work. According to Kimble's testimony, her health insurance had expired.

Meanwhile, as Kimble was working the temporary detail at the Chicago Central Facility, Joyce Baines ("Baines") became the new Supervisor of Distribution Operations at the Irving Park Facility. Because Kimble never returned to the Irving Park Facility, however, Baines did not personally know who Kimble was. In fact, Baines testified that she never met Kimble and that Kimble never worked for her personally. Nevertheless, in light of Kimble's absence, on October 3, 2001 Baines sent to Kimble a standard letter explaining that Kimble had been absent from work without justification and without providing any medical documentation that would evidence an incapacity to work after September 30, 2001. *Id.*, Ex. Q, Baines Ltr. The letter went on, stating that "[e]mployees are required to be regular in attendance" and that Kimble's "[f]ailure to document [her] absences and continued AWOL could result in disciplinary action up to and including removal from Postal Service." *Id.* Kimble failed to respond.

On November 28, 2001, still without any word from Kimble, Baines sent a letter to Kimble entitled, "Notice of Removal," which, in effect, terminated Kimble's employment after thirty days. *Id.*, Ex. R. The stated reason for Kimble's removal was her

absence without official leave, otherwise known as "AWOL." The letter explained specifically that Kimble had been absent from work since September 30, 2001 and that she failed to provide acceptable documentation for her absence, thereby causing the USPS to consider her AWOL. *Id.* The letter also informed Kimble of her right to file a grievance and of her right to provide the USPS with an explanation of her position.

B. PROCEDURAL HISTORY

On April 2, 2002 Kimble sought EEO counseling on a claim of disability discrimination and a failure to accommodate. In support, she cited the USPS' denial of her request for a permanent position at the Chicago Central Facility. She filed a formal EEO complaint on June 10, 2002, this time adding a claim for age discrimination. On February 5, 2004 the parties conducted a hearing before the EEOC. A few months later, on September 29, 2004, an Administrative Law Judge ("ALJ") issued a written decision, finding that Kimble failed to present sufficient evidence that she was disabled as defined by the Rehabilitation Act. *See* Pl.'s Exhibits, Ex. D at 6. Beyond that, the ALJ also determined that even if Kimble could establish that she was disabled, the USPS articulated a legitimate, non-discriminatory reason for its actions, which Kimble could not refute. *Id.* In the end, the ALJ found in favor of the USPS.

Operating pro se, Kimble initiated this action on May 9, 2006. She filed a first amended complaint

on November 17, 2006, which the USPS answered within the allotted timeframe. Kimble eventually retained an attorney, who filed a second amended complaint on Kimble's behalf. When discovery was complete, the USPS filed this motion for summary judgment. The USPS' motion is fully briefed and before the Court.

II. DISCUSSION

A. STANDARD OF DECISION

Summary judgment is proper when there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, and where the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Sides v. City of Champaign,* 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broad. Group, Inc.,* 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material fact exists, all facts are construed in favor of the nonmoving party, who, in this case, is the Plaintiff Kimble. *See Squibb v. Mem'l Med. Ctr.,* 497 F.3d 775, 780 (7th Cir. 2007). But the court's favor toward the nonmoving party does not relieve that party of the obligation to "do more than simply show that there is some metaphysical doubt as to the material facts." *Waukesha Foundry. Inc. v. Indus. Eng'g, Inc.,* 91 F.3d 1002, 1007 (7th Cir. 1996) (quoting *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

Once the moving party has met its burden, the nonmoving party may not then rest on mere allegations to support its position, but instead "[t]o successfully oppose a motion for summary judgment, the nonmoving party must come forward with specific facts demonstrating that there is a genuine issue for trial." *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 677 (7th Cir. 2008). In other words, summary judgment "is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince the trier of fact to accept its version of the events." *Steen v. Meyers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). Further, "[i]t is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008) (citing *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996)).

We note that the mere existence of some alleged or possible factual dispute will not defeat an otherwise properly supported motion for summary judgment, as speculation will not suffice. *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001). "Inferences and opinions must be

grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors," and discrimination law would be unmanageable if disgruntled employees could defeat summary judgment on mere speculations about the defendant's motives. *See Rand v. CF Indus., Inc.*, 42 F.3d 1139, 1146 (7th Cir. 1994) (quoting *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991)). With these standards in mind, the Court shall determine whether Kimble's claims, based on the evidence, can withstand summary judgment.

B. DISCRIMINATION UNDER THE ADEA

The ADEA makes it unlawful for an employer to discharge an employee because of age when the employee is over forty years old. *See* 29 U.S.C. §§ 623(a)(1), 631(a). To establish a claim under the ADEA, Kimble must show that her age "actually motivated" the USPS' decision to terminate her employment. *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008) (citing *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489 (7th Cir. 2007)). To that end, and in light of Kimble's failure to present any direct evidence of discrimination on account of her age, she must proceed under the well-known, indirect burden-shifting method of proof established in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 (1973). This oft-cited test requires Kimble to first establish a prima facie case of discrimination and, next, to refute her employer's stated reason for her termination as pretext. *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1290 (7th Cir. 1997); *Hong v.*

Children's Mem'l Hosp., 993 F.2d 1257, 1261 (7th Cir. 1993). The ultimate burden of persuasion, however, remains with Kimble. *Malacara v. City of Madison*, 224 F.3d 727, 729 (7th Cir. 2000).

As a preliminary matter, before considering the sufficiency of Kimble's prima facie case, the Court finds that Kimble has failed to establish that a reasonable jury, considering all the evidence, would find that this case has anything to do with Kimble's age. It is well-settled that for an ADEA claim to stand, the decision to terminate the employee must be *motivated* by age, *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Miller v. American Airlines, Inc.*, No. 03 C 7756, 2007 WL 489147, at *10 (N.D. Ill. Feb. 6, 2007). Here, Kimble has failed to produce any evidence that supports a finding, even under the most liberal reading, that her termination was somehow motivated by age. Recall that Kimble's supervisor at the time of her termination, Baines, had never met Kimble because Kimble did not show up for work. What is more, Kimble failed to produce any evidence that Baines knew of Kimble's age at the time Baines made the decision to remove Kimble from service. Because of this, there is nothing from which a reasonable jury could draw even the slightest inference that Kimble's age was a motivating factor in the USPS' ultimate decision.

1. Prima Facie Case of Age Discrimination

Turning to Kimble's discrimination claim, Kimble's first hurdle is to establish a prima facie

case, which requires her to proffer evidence that: (1) she belongs to a protected class; (2) she was meeting the USPS' legitimate expectations; (3) she suffered an adverse employment action; and (4) the USPS sought someone to perform the same work after Kimble left the company. *Pantoja v. Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840, 846 (7th Cir. 2007) (citing *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985)).

There is no dispute that Kimble was a member of a protected class, that she was meeting her employer's expectations or that she suffered an adverse employment action. But Kimble failed to produce any evidence that the USPS sought someone to perform her duties after she was relieved from service. This is a critical element of her prima facie case, though Kimble neither attempts to explain her failure to produce any evidence, nor does she present the court with an argument as to why she should not be required to produce such evidence. We need not dwell on this issue, except to say that Kimble's failure to present any evidence to establish the fourth element of her prima facie case serves as a sufficient basis, on its own, to grant summary judgment in favor of the USPS.

2. Pretext

Even assuming that Kimble presented the Court with evidence to establish her prima facie case, because the USPS based its decision on Kimble's failure to supply it with medical

documentation that evidenced her incapacity to work — a non-discriminatory reason for Kimble's termination — she is required to show that the USPS' stated reason was a mere pretext for discrimination.

An employee demonstrates pretext directly by offering evidence that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's "ostensible justification is 'unworthy of credence.'" *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297, 302-03 (7th Cir, 1996); see *Bodenstab v. Cook County*, ---F.3d---, 2009 WL 1739908, at *3 (7th Cir. June 22, 2009). While operating under the indirect method to show pretext, a plaintiff must identify such weaknesses, implausibilities, inconsistencies or contradictions in the employer's proffered reasons that a reasonable person could infer that the employer did not act for those reasons. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). And, we must keep in mind throughout this inquiry that pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is a "lie, specifically a phony reason for some action." *Sublett v. John Wiley & Sons, Inc.*, 463, F.3d 731, 737 (7th Cir. 2006). In the end, a defendant is entitled to summary judgment if the company honestly believed in the nondiscriminatory reasons it offered, even if those reasons are foolish, trivial or even baseless. *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997); *McCoy v. WGN Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992).

Here, Kimble does not present any direct evidence that a discriminatory reason motivated the USPS to terminate her employment. As a result, Kimble must point to any inconsistencies or contradictions in the USPS' proffered reason for her termination, so that a reasonable person could infer that the USPS did not act for its stated reason. As the basis for Kimble's termination, her supervisor, Baines, testified that Kimble failed to present the USPS with acceptable medical documentation that justified her absence from work. This failure remains undisputed. Nevertheless, in response, Kimble asserts that Baines' testimony is not credible because a dispute remains as to whether Baines submitted an affidavit during the administrative investigation of Kimble's EEO complaint. This assertion is irrelevant, however, because it has nothing to do with Baines' stated reason for Kimble's termination.

A plaintiff cannot refute as pretext an employer's stated reason for terminating the plaintiff by simply calling into doubt the credibility of the person who made the decision. *See Traylor v. Brown,* 295 F.3d 783, 791 (7th Cir. 2002) (affirming summary judgment where plaintiff attacked employer's credibility but failed to present evidence of pretext); *see also EEOC v. Target Corp.,* 460 F.3d 946, 960 (7th Cir. 2006) (noting that "general determinations" of credibility do not "control whether a specific hiring decision was honestly justified"). The plaintiff, rather, must attack the credibility of the employer's reason itself, and may do so by presenting evidence that the employer's

explanation was contrary to the facts, insufficient to justify the action or not truly the employer's motivation. *Id.*; *see Schuster v. Lucent Techs., Inc.*, 327 F.3d 569, 574 (7th Cir. 2003) (explaining that a plaintiff may show pretext through evidence that the *employer's justification* lacks credibility); *Mathews v. Columbia College Chicago,* 435 F. Supp. 2d 805, 816-17 (N.D. Ill. 2006). Here, Kimble failed in all respects to present the Court with any competent evidence that the USPS did not believe its reason for terminating Kimble or that the scenario was entirely implausible. Without anything more, Kimble cannot establish that the USPS' reason for her termination was pretextual. The USPS' motion for summary judgment is therefore granted as to Count I.

C. DISCRIMINATION UNDER THE REHABILITATION ACT

The Rehabilitation Act provides that the United States Postal Service shall not discriminate against a qualified individual with a disability solely because of his or her disability. 29 U.S.C. § 794(a). The standards used to determine whether a violation of the Rehabilitation Act has occurred are those used to interpret the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 794(d); *Gile v. United Airlines, Inc.,* 95 F.3d 492, 497 (7th Cir. 1996). Under the ADA, a failure to make reasonable accommodations for a known disability constitutes unlawful discrimination. 42 U.S.C. § 12112(b)(5)(A). Yet, to prevail on an ADA claim, a plaintiff must show that: (1) he or she is a qualified individual

with a disability; (2) the defendant was aware of his or her disability; and (3) the defendant failed to reasonably accommodate the disability. *Mobley v. Allstate, Ins. Co.*, 531 F.3d 539, 545 (7th Cir. 2008) (citing *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005)).

In this case, the parties do not contest whether the USPS was aware of Kimble's condition. Instead, the USPS asserts that Kimble was not "disabled" as defined by the ADA, and, even if the Court finds that Kimble was disabled, the USPS had no duty to accommodate her alleged disability. The Court shall discuss each of these contentions in turn.

1. "Disabled" Under the ADA

The ADA protects only qualified individuals with disabilities. Thus to maintain a claim under the ADA the burden rests with Kimble to prove that at all relevant times she was disabled within the meaning of the statute. See *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453-54 (7th Cir. 1995). An individual is disabled under the ADA if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1059-60 (7th Cir. 2000).

Kimble bases her claim on the first definition above, arguing that she suffers from disequilibrium,

a condition that precludes her from driving a vehicle for more than thirty minutes at a time. Notably, however, Kimble does not argue that her disequilibrium precludes her from working altogether — it only applies to her driving. In fact, as stated previously, when asked at the EEO hearing whether she was "able to perform all [her] duties as Distribution Clerk despite [her disequilibrium]," Kimble responded "yes" and later confirmed that she could perform all of her normal job functions once she arrived at work. Def.'s L.R. 56.1 Statement, Ex. A, Hr'g Tr. at 11. In this way, to qualify as disabled under the ADA, Kimble must establish that the act of driving a vehicle, as opposed to working, is "a major life activity" that her disequilibrium substantially limited. Under the circumstances, the Court finds that she cannot.

The EEOC has promulgated a non-exclusive list of "major life activities," which include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2. Excluded from this list, however, is driving a vehicle, which many courts, including the Seventh Circuit, do not consider a major life activity in and of itself. *Winsley v. Cook County,* 563 F.3d 598, 603 (7th Cir. 2009); *Kellog v. Energy Safety Servs., Inc.,* 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County,* 250 F.3d 1328, 1329-30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dep't,* 158 F.3d 635, 643 (2d Cir. 1998). But this rule is not unyielding. In limited circumstances, the inability to drive could support a disability if it impairs the plaintiff's ability to work

altogether. See *Winsley,* 563 F.3d 598. To qualify under this exception, the impairment, or inability to drive, must substantially limit one's employment generally. This means that "an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work." Skorup v. Modern Door Corp., 153 F.3d 512, 514 (7th Cir. 1998). Rather, the inability to drive must restrict a plaintiff from performing a broad range of jobs in various classes. *Id.*

In light of the above standards, it is clear that Kimble's inability to drive for more than thirty minutes at a time does not qualify as a "major life activity." Significantly, there is nothing in the record to show that Kimble's inability to drive impaired her ability to work in general. This is not a case in which Kimble could not work; she simply could not drive for more than thirty minutes at a time. It is undisputed that even after Kimble suffered a stroke she drove a vehicle to and from work. And, once Kimble arrived at work, she did not need any special accommodations or assistance, nor did she request any. This evidence, by itself, takes Kimble outside of the exception and substantially weakens any claim that Kimble's limitation qualified as a "major life activity." As it turns out, Kimble cannot overcome the general rule that driving a vehicle is not a major life activity, and therefore she does not qualify as disabled under the ADA. The Court therefore grants summary judgment in favor of the USPS.

2. Duty to Accommodate

Finally, the USPS claims that even if Kimble was disabled it had no duty to accommodate her inability to drive. In support, the USPS cites several cases in which the district court held that an employer is not required to accommodate an employee's commute to work. *See Filar v. Chi. Sch. Reform Bd. of Trs.,* No. 04 C 4678, 2007 WL 79290, at *6 (N.D. Ill. Jan. 5, 2007) ("activities that fall outside the scope of employment, such as commuting to and from a job location[, are] outside the responsibility of the employer under the ADA."); *Cruz v. Perry,* No. 01 C 5746, 2003 WL 1719995, at *5 (N.D. Ill. Mar. 31, 2003) ("the length of [plaintiff's] commute is the result of her choice to live in the suburbs, rather than the result of any disabling condition."); *Bull v. Coyner,* No. 98 C 7583, 2000 WL 224807, at *7 (N.D. Ill. 2000) ("Activities that fall outside the scope of the job, like commuting to and from the workplace, are not within the province of an employer's obligation under the ADA."). Kimble gives the Court no reason to stray from these decisions. There is no dispute that the USPS was aware of Kimble's limitations and that it took measures to assist her, temporarily, in getting to and from work. But the USPS' prior assistance did not somehow obligate the USPS to continue providing assistance for purposes of the ADA. The cases cited above establish that one's commute to work falls outside the scope of his or her job. And, again, Kimble did not require assistance once she arrived at work. Rather, she preferred a shorter commute because her physician suggested that she limit her driving time to thirty minutes. Kimble did

not assist herself in this endeavor by relocating to an area of the city that substantially lengthened her commute, or by ignoring altogether Chicago's extensive public transportation system. Either way, we find that Kimble's preference for a shorter commute falls outside the responsibility of the USPS. Thus the Court finds that the USPS had no obligation to accommodate Kimble for her perceived disability. Summary judgment is granted as to Count II.

III. CONCLUSION

For the reasons stated above, the Defendant USPS' motion for summary judgment is granted against the Plaintiff Flora L. Kimble in its entirety.

IT IS SO ORDERED.

ENTER:

/s/Charles R. Norgle
CHARLES R. NORGLE, Judge
United States District Court

DATED: 07/13/2009

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Section 3237 of Title 18 of the United States Code provides:

> **(a)** Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district

from, through, or into which such commerce, mail matter, or imported object or person moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1986, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

18 U.S.C. § 3237.

Section 6091 of Title 26 of the United States Code provides in relevant part:

> **(b) Tax returns.** – In the case of returns of tax required under authority of part II of this subchapter –
>
> > **(1) Persons other than corporations.** –
> >
> > > **(A) General rule.** – Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary –
> > >
> > > > **(i)** in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or
> > > >
> > > > **(ii)** at a service center serving the internal revenue district referred to in clause (i), as the Secretary may by regulations designate.
> > >
> > > **(B) Exception.** – Returns of –
> > >
> > > > **(i)** persons who have no legal residence or principal place of business in any internal revenue district,
> > > >
> > > > **(ii)** citizens of the United States whose principal place of abode for the period with respect to which the return is

> filed is outside the United States,
>
> **(iii)** persons who claim the benefits of section 911 (relating to citizens or residents of the United States living abroad), section 931 (relating to income from sources within Guam, American Samoa, or the Northern Mariana Islands), or section 933 (relating to income from sources within Puerto Rico),
>
> **(iv)** nonresident alien persons, and
>
> **(v)** persons with respect to whom an assessment was made under section 6851(a) or 6852(a) (relating to termination assessments) with respect to the taxable year, shall be made at such place as the Secretary may by regulations designate.

26 U.S.C. § 6091(b)(1).

Section 7203 of Title 26 of the United States Code provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails

> to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined * * * or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C. § 7203.

Federal Rule of Criminal Procedure 18 provides:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Fed. R. Crim. P. 18.

Federal Rule of Criminal Procedure 21 provides:

> **(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
>
> **(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.
>
> **(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.
>
> **(d) Time to File a Motion to Transfer.** A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Fed. R. Crim. P. 21.